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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 3/2018 concerning Chayapha Chokepornbudsri (Thailand)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 12 December 2017, the Working Group transmitted to the Government of Thailand a communication concerning Chayapha Chokepornbudsri. The Government provided initial clarifications on 13 December 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Chayapha Chokepornbudsri, born on 11 November 1966, is a Thai national. Prior to her detention, Ms. Chayapha worked as an accountant. Her usual place of residence was Mueang District, Samut Prakan Province, Thailand.

5. In the early morning of 19 June 2015, a group of military personnel from the 2nd Infantry Division and police officers from the Technology Crime Suppression Division arrested Ms. Chayapha at her residence while she was preparing to go to work. Officers searched her house, confiscated her laptop and mobile telephone and took Ms. Chayapha to the 11th Infantry Battalion Military Circle in Bangkok. She was detained there for four days before being remanded to the custody of the police.

6. Reportedly, the authorities did not produce an arrest warrant at the time of Ms. Chayapha's arrest. The Bangkok Military Court issued arrest warrant No. 2/2015 only on 22 June 2015 — three days after Ms. Chayapha was taken into military custody. On 23 June 2015, Ms. Chayapha was remanded to the custody of police from the Technology Crime Suppression Division at the Thung Song Hong Police Station in Bangkok. She was charged with violating the provisions of section 112 (lese-majesty) and of section 116 (sedition) of the Penal Code.

7. On 24 June 2015, Ms. Chayapha appeared at a televised press conference organized by the police and confessed to the crimes for which she had been charged.

8. On 25 June 2015, Ms. Chayapha was transferred to the Bangkok Military Court for a pretrial detention hearing. The Court rejected her request for bail on the grounds that she was a potential flight risk. Ms. Chayapha was then taken to the Central Women's Correctional Institution.

9. The source submits that, throughout the period of her initial detention, Ms. Chayapha had no access to a lawyer. While she was in military custody, army personnel reportedly threatened that she could face a harsher prison sentence if she sought access to legal counsel.

10. Ms. Chayapha was charged with two counts of lese-majesty (section 112 of the Penal Code) for posting two messages on Facebook, on 10 and 11 June 2015, which, according to the authorities, referred to the involvement of the Thai royal family in Thai politics. In addition, Ms. Chayapha was charged with three counts of sedition (section 116 of the Penal Code) for posting three messages on Facebook, on 11 and 12 June 2015, which the authorities interpreted as a suggestion that a military counter-coup was under way against the junta.

11. On 15 December 2015, Ms. Chayapha was taken to the Bangkok Military Court for a closed trial. Neither Ms. Chayapha nor her lawyer were given sufficient notice about the court hearing. Without a lawyer representing her in court, Ms. Chayapha decided to plead guilty to the charges. As a result, the court immediately sentenced her to 10 years in prison on two counts of lese-majesty and 9 years in prison on three counts of sedition. The court halved the 19-year sentence to nine and a half years in consideration of Ms. Chayapha's guilty plea. She was then returned to the Central Women's Correctional Institution to serve her sentence, where she remains today.

12. The source considers that Ms. Chayapha's deprivation of liberty falls within categories II and III of the Working Group.

13. In relation to category II, the source submits that Ms. Chayapha's deprivation of liberty is arbitrary because it results from her exercise of the rights and freedoms guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which Thailand is a State party. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 19 (2) of the Covenant states that everyone has the right to

freedom of expression; that right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his or her choice.

14. In relation to category III, the source argues that the non-observance of the international norms relating to the right to a fair trial guaranteed by article 14 of the Covenant is of such gravity as to give the deprivation of liberty of Ms. Chayapha an arbitrary character. In this respect, the source submits that Ms. Chayapha was not informed promptly and in detail of the nature and cause of charges brought against her and did not have adequate time for the preparation of her defence. She was also denied her right to receive legal assistance at all stages of the proceedings and her right not to be compelled to testify against herself or to confess her guilt. These rights are guaranteed by article 14 (3) (a), (b), (d) and (g) of the Covenant.

15. In addition, the source submits that the trial that resulted in her prison sentence was conducted behind closed doors in a military court, in violation of article 14 (1) and (5) of the Covenant. The source notes that, as a result of the declaration of martial law by the Thai Army on 20 May 2014, the National Council for Peace and Order issued Announcement 37/2014 on 25 May 2014. Military courts assumed jurisdiction over lese-majesty cases for offences committed after that date. Between May 2014 and February 2016, Thai military courts have tried and sentenced to prison 24 defendants in lese-majesty cases, including Ms. Chayapha.

16. The source notes that individuals who allegedly committed lese-majesty offences between 25 May 2014 and 31 March 2015 had no right to appeal the decision made by the military courts as a result of the declaration of martial law and in accordance with article 61 of the Military Court Act of 1955. It is argued that this constitutes a violation of article 14 (5) of the Covenant, which prescribes that everyone convicted of a crime has the right to his or her conviction and sentence being reviewed by a higher tribunal.

17. The source further submits that the trial of Ms. Chayapha in a military court is also in breach of article 14 (1) of the Covenant, which states that everyone has the right to a "fair and public hearing by a competent, independent and impartial tribunal".

18. The source also argues that Thai military courts are not independent from the executive branch of the Government. Military courts are units of the Ministry of Defence, and military judges are appointed by the Army Commander-in-Chief and the Minister of Defence. The source also submits that military judges lack adequate legal training. Lower military courts in Thailand reportedly consist of panels of three judges, and only one of them has legal training. The other two judges are commissioned military officers who sit on the panels as representatives of their commanders.

19. With regard to the right to a public hearing, the source notes that lese-majesty trials in military courts have been characterized by a lack of transparency. Military courts have held many lese-majesty trials behind closed doors. Military judges have routinely barred the public, including observers from international human rights organizations and foreign diplomatic missions, from entry into the courtroom. On numerous occasions, military courts claimed that closed proceedings were necessary because lese-majesty trials were a matter of national security and could affect public morale.

20. The source also argues that Ms. Chayapha's prolonged pretrial detention and the military court's refusal to grant her bail is a violation of article 9 (3) of the Covenant, which states that "it shall not be the general rule that persons awaiting trial shall be detained in custody". The source also refers to Human Rights Committee general comment No. 8 (1982), in which the Committee stated that pretrial detention should be an exception and as short as possible. In this context, the source notes that only 4 of the 66 individuals (6 per cent) arrested for alleged violations of section 112 of the Penal Code after the military coup of 22 May 2014 were released on bail pending trial. Courts have regularly denied bail to defendants in lese-majesty cases, including Ms. Chayapha, by claiming that they would be flight risks.

21. Furthermore, the source argues that the court's argument that the potential punishment is very severe and that Ms. Chayapha is a flight risk and should therefore not be

granted bail runs contrary to international human rights standards and jurisprudence of United Nations human rights bodies. In its general comment No. 35 (2014) on liberty and security of person, the Human Rights Committee stated that detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should not include vague and expansive standards such as "public security". The Committee also noted that pretrial detention should not be ordered based on the potential sentence for a crime; rather, it should be based on a determination of necessity.

Initial clarifications from the Government

22. On 12 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information before 12 February 2018 about the current situation of Ms. Chayapha. The Working Group also requested the Government to clarify the legal provisions justifying her continued detention, as well as the compatibility of her detention with the obligations of Thailand under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Ms. Chayapha.

23. On 13 December 2017, the Government acknowledged receipt of the communication and undertook to send the Working Group further information. The Government provided initial clarifications on the use of lese-majesty law and the military court, as follows.

24. According to the Government, it supports and values freedom of expression and believes that such freedom is the basis of a democratic society and that the people can freely exercise it. Nevertheless, such a right is not absolute and must be exercised within the boundary of the law.

25. The Government claims that the application of the lese-majesty law is in accordance with the above-mentioned objectives. The Thai monarchy has been a pillar of stability in Thailand, and the Thai sense of identity is closely linked to the monarchy. The lese-majesty law is not aimed at curbing people's right to freedom of expression but instead has the objective of giving protection to the rights or reputation of the King, the Queen and the heir-apparent of the Regent in a similar way as libel law does for commoners. It is not aimed at curbing people's right to freedom of expression.

26. In the Government's view, as with other criminal offences, proceedings on lese-majesty cases are conducted in accordance with due legal process. Persons who are charged for lese-majesty are entitled to the same rights as those charged for other criminal offences.

27. The Government also considers that the military court upholds the principles of independence and neutrality, similar to the court of justice. The military court must comply with the Criminal Procedure Code, which guarantees the right to a fair trial and the rights of defendants, such as the right to have legal assistance and the right to bail, in accordance with international standards, when putting civilians on trial.

28. All judges at the military court must have practised law within the military judicial system for no less than 20 years and are required to have the same set of knowledge and expertise in criminal law as judges in civilian courts.

29. Thai law also provides that judges, in both the court of justice and military courts, may use discretion as to whether to hold closed trials in the interests of public order, good morals or national security, if the cases are deemed to involve sensitive matters. This is consistent with article 14 of the Covenant and not dissimilar to the practice in other countries.

30. No further information was received from the Government afterwards. The Government's initial clarifications contain general arguments for the lese-majesty law and the military court but no specific details regarding Ms. Chayapha's arrest, detention and imprisonment or their factual and legal justification or assurances of her physical and mental integrity, as requested by the Working Group.

31. While the Working Group will take into consideration the information obtained from the Government's initial clarifications in rendering its opinion, it notes that they cannot be properly considered a "response" for the purpose of paragraphs 15, 16 and 21 (c) of its methods of work.

Further comments from the source on the Government's initial clarifications

32. On 10 April 2018, the initial clarifications from the Government were sent to the source for further comments. In its response of 13 April 2018, the source states that the Government has repeated, verbatim, many of its previous responses to communications sent by United Nations bodies on the issue of lese-majesty as well as the use of military courts for trials of civilians accused of violating section 112 of the Thai Penal Code (lese-majesty). According to the source, the Government has consistently failed to provide detailed reasoning as to why it believes that the arrests made, detentions carried out and lengthy jail sentences handed down in application of section 112 are in compliance with article 19 of the Covenant. It has also repeatedly failed to specifically address the use of military courts to try defendants in lese-majesty cases, which contravenes article 14 of the Covenant.

33. The source presents examples of earlier responses of international human rights bodies concerning the lese-majesty law. Firstly, it is noted that, in its concluding observations on the second periodic report of Thailand, adopted on 23 March 2017 (CCPR/C/THA/CO/2), the Human Rights Committee expressed its concern that criticism and dissention regarding the royal family was punishable with a sentence of 3–15 years' imprisonment and also expressed its concern about extreme sentencing practices in lese-majesty trials. Furthermore, the source notes that, on 5 July 2017, during the review of the Government's combined sixth and seventh periodic reports under the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women stated that there was a tendency by the Thai police to abuse lese-majesty, and it questioned the role of military courts in lese-majesty trials.

34. The source also details its concerns over the ongoing abuse of section 112 of the Penal Code. In that context, it submits that, from 22 May 2014 to 1 April 2018, 127 individuals were arrested under section 112 of the Penal Code. It also states that the abuse has continued, following King Maha Vajiralongkorn Bodindradebayavarangkun's accession to the throne as the new monarch, Rama X, on 1 December 2016. According to the source, from 1 December 2016 to 28 November 2017, at least 27 individuals were arrested for alleged violations of section 112 of the Penal Code. Almost half of the arrests allegedly resulted from the expression on social media of opinions perceived to be insulting to the monarchy. Moreover, the source submits that, under King Maha Vajiralongkorn, Thailand handed down the longest prison sentence ever imposed under section 112 of the Penal Code. On 9 June 2017, the Bangkok Military Court found a defendant guilty on 10 counts of lese-majesty for posting on Facebook, in December 2015, photos and comments deemed defamatory to the monarchy. The Court sentenced the person to 70 years in prison, reduced to 35 years, in consideration of the guilty plea. The source also submits that a 14-year old became the youngest person ever to be arrested for lese-majesty. On 25 May 2017, police in Khon Kaen held a press conference during which they reported that they had arrested nine people, including a 14-year old, for setting fire to roadside portraits of the late King Bhumibol and King Maha Vajiralongkorn in Baan Pai and Chonnabot Districts, Khon Kaen Province, on 3 and 13 May 2017.

35. The source claims that military tribunals have continued to try individuals and impose lengthy prison sentences for violations of section 112 of the Penal Code. Since 1 December 2016, the courts have convicted 10 individuals for lese-majesty offences. Of those 10 individuals, 3 were tried and convicted by military courts. As at 28 November 2017, there was a total of 27 ongoing lese-majesty cases in military courts. The source submits that, to date, the Government has not taken any measures to transfer the pending cases to civilian courts, despite numerous recommendations by human rights monitoring mechanisms. Trials of civilians in military courts have led to further violations of human rights, including the right to liberty and the right to a fair trial.

36. The source notes that the chances of defendants in lese-majesty cases being released on bail remain low. None of the individuals arrested for alleged violation of section 112 of the Penal Code after the accession of King Maha Vajiralongkorn to the throne have been granted bail. However, 6 of the 27 individuals in ongoing lese-majesty cases were released without charge. The source had no updates concerning the ongoing detention of Ms. Chayapha.

Discussion

37. In the absence of further information from the Government concerning Ms. Chayapha, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

38. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

39. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights, the Covenant and other applicable international and regional instruments.[1] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[2] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[3]

40. The Working Group would also like to reiterate that it applies a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities are restricted or where human rights defenders are involved. Ms. Chayapha's arrest, detention, trial and imprisonment for her messages require the Working Group to undertake this kind of strict scrutiny.[4]

Category I

41. The Working Group will examine the relevant categories applicable to its consideration of this case.

42. The Working Group notes that the Government has neither refuted nor addressed the allegation that Ms. Chayapha was arrested without a warrant, which was issued three days later, that she was not informed of the reasons for her arrest and that she was brought before a military court for a pretrial detention hearing, where she was informed of the reasons for her arrest six days after the event.

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[1] See General Assembly resolution 72/180, fifth preambular paragraph; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; Human Rights Council resolutions 6/4, para. 1 (a), and 10/9, para. 4 (b); and opinions No. 94/2017, No. 88/2017, para. 32, No. 83/2017, paras. 51 and 70, No. 76/2017, para. 62, No. 28/2015, para. 41, and No. 41/2014, para. 24.

[2] See opinions No. 94/2017, para. 47, No. 76/2017, para. 49, No. 1/2003, para. 17, No. 5/1999, para. 15, and No. 1/1998, para. 13.

[3] See opinions No. 94/2017, para. 48, No. 88/2017, para. 24, No. 83/2017, para. 60, No. 76/2017, para. 50, and No. 33/2015, para. 80.

[4] See opinions No. 94/2017, para. 49, No. 88/2017, para. 25, No. 83/2017, para. 61, No. 76/2017, para. 52, No. 39/2012, para. 45, No. 21/2011, para. 29, and No. 13/2011, para. 9. See also the Declaration on Human Rights Defenders (art. 9 (3)).

43. The international norms on detention include the right to be presented with an arrest warrant, except arrests that are made in flagrante delicto, which is inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as peremptory norms of customary international law.[5] Any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

44. The lese-majesty and sedition charges against Ms. Chayapha rest upon her five Facebook messages, posted between 10 and 12 June 2015. It cannot be said that she was caught in flagrante delicto in the commission of any alleged crimes when the authorities arrested her on 19 June 2015. Moreover, the Bangkok Military Court issued her arrest warrant only on 22 June 2015. In its jurisprudence, the Working Group has consistently found that an offence is flagrant if the accused is either apprehended during the commission of a crime or immediately thereafter, or is arrested in hot pursuit shortly after a crime has been committed.[6] In the present case, Ms. Chayapha was arrested on the basis of five Facebook messages posted between 10 and 12 June 2015. In the view of the Working Group, she was clearly not arrested in flagrante delicto.[7] The Working Group underlines that any deprivation of liberty without a valid arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks legal basis.[8]

45. The failure at the time of her arrest to inform Ms. Chayapha of the reasons for her arrest and of her rights and to inform her promptly of any charges against her further violated articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (2) and 14 (3) (a) of the Covenant, as well as principles 10 and 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The violations of the rights accorded universally to criminal suspects undermine the legal basis for her arrest and initial detention.

46. The Working Group notes that Ms. Chayapha was not brought promptly before a judge or other officer authorized by law to exercise judicial power, nor was she allowed to challenge the lawfulness of her detention before a court in accordance with article 9 (3) and (4) of the Covenant. Furthermore, in Ms. Chayapha's case, the Working Group finds it particularly troubling that the police failed to guarantee other fundamental guarantees, including prompt judicial review, while it organized a televised press conference for her "confession" on 24 June 2015, a day before her first presentation before a judge, on 25 June 2015.

47. For the reasons above, the Working Group considers that Ms. Chayapha's initial arrest and detention between 19 and 25 June 2015 lacked legal basis, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant. The Working Group therefore concludes that her detention is arbitrary under category I.

Category II

48. The Working Group recalls that the freedom of opinion and expression and the freedom of thought and conscience are fundamental human rights consecrated in articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.[9]

49. The Working Group notes that the Human Rights Committee, in its general comment No. 34 (2011) on the freedoms of opinion and expression, stated that restrictions

[5] See opinion No. 88/2017, para. 27.

[6] Opinion No. 36/2017, para. 85. See also opinions No. 53/2014, para. 42, No. 46/2012, para. 30, No. 67/2011, para. 30, and No. 61/2011, paras. 48–49; and E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

[7] See opinion No. 9/2018, para. 38.

[8] See opinion No. 93/2017, para. 44.

[9] See CCPR/C/78/D/878/1999, para. 7.2.

on the freedom of expression must not be overbroad and recalled that such restrictions must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those which might achieve their protective function and be proportionate to the interest to be protected. Moreover, the Committee, in paragraph 38 of that general comment, emphasized that all public figures were legitimately subject to criticism and political opposition, and expressed its concern regarding laws on lese-majesty, disrespect for authority, defamation of the Head of State and the protection of the honour of public officials, with a pointed reminder that laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. The Committee emphasized, in paragraph 42 of that same general comment, that the penalization of a media outlet, publishers or journalist solely for being critical of the Government or the political social system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.

50. In the same vein, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that the right to freedom of expression includes the expression of views and opinions that offend, shock or disturb.[10] In addition, the Human Rights Council, in its resolution No. 12/16, paragraph 5 (p) (i), stated that restrictions on discussion of government policies and political debate are not consistent with article 19 (3) of the Covenant.

51. The aforementioned analysis sheds specific light on this case. Ms. Chayapha was arrested, detained, prosecuted and imprisoned under sections 112 (lese-majesty) and 116 (sedition) of the Penal Code for her Facebook messages allegedly referring to the royal family's involvement in politics and a purported military counter-coup against the junta.

52. The Government claimed, in its initial clarifications, that the lese-majesty law had the objective of respecting the rights or reputation of the royals and regents, a legitimate restriction upon the freedom of expression under article 19 (3) (a) of the Covenant. However, in the Working Group's assessment, the purported objective of the lese-majesty law can hardly be considered as a valid ground for a necessary restriction of freedom of expression, given that all public figures can be legitimately subject to criticism and political opposition. In this specific case, the Working Group cannot but also consider that the detrimental effects of the lese-majesty law and its application on Ms. Chayapha's freedoms and the chilling effect for the public far outweigh any potential benefits. In this vein, the Working Group has been unable to find Ms. Chayapha's deprivation of liberty under sections 112 (lese-majesty) and 116 (sedition) of the Penal Code, and criminal provisions per se, necessary or proportional for the purposes set out in article 19 (3) of the Covenant.

53. The Working Group notes that, on 8 July 2014, following the invocation of the nationwide martial law on 20 May 2014, the Government notified of its derogation from certain provisions of the Covenant, pursuant to article 4 of the Covenant. However, no derogation has been notified with regard to article 9 of the Covenant.[11] The Working Group expresses its concern at the broad and open-ended definition of terms used by the Government and cannot but consider that the lese-majesty legislation and prosecution are not necessary or proportional to the Government's stated purpose of affording vital national security protection in declaring martial law on 20 May 2014.

54. The Working Group therefore considers that Ms. Chayapha's deprivation of liberty is arbitrary under category II, as it resulted from her exercise of the rights or freedoms guaranteed under articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.

Category III

55. Given its finding that Ms. Chayapha's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that no trial of Ms. Chayapha should have taken place. However, with the trial having taken place, the Working Group will now

[10] See A/HRC/17/27, para. 37.

[11] See depositary notification C.N.479.2014.TREATIES-IV.4.

consider whether the alleged violations of the right to a fair trial and due process were grave enough to give her deprivation of liberty an arbitrary character, so that it falls within category III.

56. The Working Group considers that the Bangkok Military Court did not provide a public hearing, as required under article 14 (1) of the Covenant, given that Ms. Chayapha was tried, convicted and sentenced in closed sessions, from which observers from international human rights organizations and foreign diplomatic missions were excluded. None of the exceptions to that rule stipulated in article 14 (1), such as national security or public order, that would allow a trial to be closed to the public, can reasonably apply to her trial.[12]

57. In addition, to reiterate the Working Group's prior findings, Thai military courts cannot be considered competent, independent or impartial as required under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.[13] Thai military courts can hardly be considered independent of the executive branch of Government because military judges are appointed by the Commander-in-Chief of the Army and the Minister of Defence. Moreover, they lack sufficient legal training and sit in closed sessions as representatives of their commanders.

58. Trials of civilians and the placing of civilians in preventive detention by military courts are in violation of the Covenant and customary international law, as confirmed by the jurisprudence of the Working Group. The intervention of a military judge who is neither professionally nor culturally independent is likely to produce an effect contrary to the enjoyment of the human rights and to a fair trial with due guarantees.[14]

59. In addition, the Working Group notes that, in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee stated that the guarantees of a fair trial under article 14 of the Covenant cannot be limited or modified because of the military or special nature of a court (para. 22). In the present case, Ms. Chayapha was informed of the nature and cause of the charges against her four days after her arrest, a delay for which the Government provided no explanation, in violation of article 14 (3) (a) of the Covenant. In addition, she was not informed of her right to legal assistance, did not have access to a lawyer when she was being interrogated by the police and was not given adequate time and facilities for the preparation of her defence, in breach of article 14 (3) (b) and (d) of the Covenant.[15]

60. The Government failed to respect Ms. Chayapha's presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights, article 14 (2) of the Covenant and principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In broadcasting her confession before trial, the Government violated her right to be presumed innocent and prejudiced her rights to a fair trial. The Working Group recalls that all public officials have a duty to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused.[16] While the presumption of innocence needs to be balanced with the public's right to information in a democratic society, the latter must be proportionate to the former.[17]

61. The Working Group would also like to consider the military court's refusal to grant Ms. Chayapha bail. Article 9 (3) of the Covenant requires that detention in custody of persons awaiting trial should be the exception rather than the rule, subject to guarantees of

[12] See also opinions No. 56/2017, para. 57, No. 51/2017, para. 42, and No. 44/2016, para. 31.

[13] Opinions No. 56/2017, para. 58, and No. 51/2017, para. 43.

[14] See A/HRC/27/48, para. 68.

[15] See also United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 10, 11 (1), 15 and 17–19.

[16] See opinion No. 33/2017, para. 86 (e). See also Human Rights Committee general comment No. 35 (2014) on liberty and security of person, and CCPR/C/69/D/770/1997 and Corr.1, paras. 3.5 and 8.3.

[17] See opinions No. 83/2017, para. 79, and No. 57/2017, para. 56.

appearance, including appearance for trial, appearance at any other stage of the judicial proceedings and, should the occasion arise, appearance for execution of the judgment. Detention pending trial must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Nor should pretrial detention be mandatory for all defendants charged with a particular crime, without regard to individual circumstances, or ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity.[18]

62. The Working Group notes with particular concern that only 4 of the 66 individuals (6 per cent) arrested for alleged violations of section 112 of the Penal Code after the military coup of 22 May 2014 were released on bail pending trial. In Ms. Chayapha's case, the Working Group considers that the military court cannot rely on the severity of potential punishment for lese-majesty offences to deny bail. It also considers that the near-blanket rejection of bail applications by those accused of lese-majesty offences casts serious doubt on the individualized determination of Ms. Chayapha's flight risk. The Working Group is therefore of the view that the Government has not fully met the burden of demonstrating the necessity for Ms. Chayapha's pretrial detention.

63. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give the deprivation of liberty of Ms. Chayapha an arbitrary character that falls within category III. Ms. Chayapha's guilty plea is of questionable validity as it is unlikely that informed consent or an informed decision can be made without legal counsel.

64. The Working Group wishes to express its grave concern about the pattern of arbitrary detention in cases involving the lese-majesty laws of Thailand. Given the increased usage of the Internet and social media as a means of communication, it is likely that the detention of individuals for exercising their rights to freedom of opinion and expression online will continue to increase until steps are taken by the Government to bring the lese-majesty laws into conformity with international human rights law.[19]

65. Given the continuing international concern regarding the country's lese-majesty laws, the Government may consider it to be an appropriate time to work with international human rights mechanisms to bring those laws into conformity with its international obligations under the Universal Declaration of Human Rights and the Covenant.

Country visit to Thailand

66. The Working Group would like to reiterate that it would welcome the opportunity to conduct a country visit to Thailand, in accordance with the request it made on 6 April 2017, so that it can engage with the Government constructively and offer assistance to address its serious concerns relating to the arbitrary deprivation of liberty.[20] The Working Group notes in particular the recent cases that it has considered.[21] The Working Group also notes that Thailand has issued a standing invitation to all special procedure mandate holders since 4 November 2011 and looks forward to an invitation to visit the country.

Disposition

67. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Chayapha Chokepornbudsri, being in contravention of articles 2, 3, 7, 9, 10, 11, 12 and 14 of the Universal Declaration of

[18] See A/HRC/19/57, paras. 48–58, and Human Rights Committee general comment No. 35 (2014), para. 38.

[19] See also opinions No. 56/2017, para. 72, and No. 51/2017, para. 57.

[20] See also opinions No. 56/2017, para. 73, No. 51/2017, para. 58, and No. 44/2016, para. 28.

[21] Opinions No. 56/2017, No. 51/2017, No. 44/2016, No. 15/2015, No. 43/2015, No. 41/2014, No. 19/2014 and No. 35/2012.

Human Rights and of articles 2, 9, 14, 15, 17 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

68. The Working Group requests the Government of Thailand to take the steps necessary to remedy the situation of Ms. Chayapha without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

69. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Chayapha immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law.

70. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Chayapha and to take appropriate measures against those responsible for the violation of her rights.

Follow-up procedure

71. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Ms. Chayapha has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. Chayapha;

(c) Whether an investigation has been conducted into the violation of Ms. Chayapha's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Thailand with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

72. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

73. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

74. The Government should disseminate through all available means the present opinion among all stakeholders.

75. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[22]

[*Adopted on 17 April 2018*]

[22] Human Rights Council resolution 33/30, paras. 3 and 7.